DILL *v.* EBEY, RECEIVER OF THE CITIZENS' BANK AND TRUST COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 191. Argued March 17, 1913.—Decided May 26, 1913.

Section 723, Rev. Stat., declaring that suits in equity shall not be sustained where a plain, adequate and complete remedy may be had at law, by its own terms applies only to courts of the United States; and does not apply to a territorial court, the procedure of which has been prescribed according to the law of an adjoining State, and to c. 18, Rev. Stat., which does not include § 723.

Even if a demurrer in an action in the United States Court of Indian Territory, on the ground that the action should be at law instead of in equity, does amount to an assertion of right under § 723, Rev. Stat., that section is so plainly inapplicable to the practice in such court that no substantial Federal question is raised that would war-

defendant may demur to the complaint for want of jurisdiction of the court over the person or the subject-matter, the plaintiff's want of legal capacity, the pendency of another action, a defect of parties, plaintiff or defendant, or "*Fifth*, That the complaint does not state facts sufficient to constitute a cause of action." Evidently, under this mode of pleading, the objection that the action is in equity, whereas it ought to be in law, is not a ground of demurrer. The liberality of the system is illustrated in *Zufall* v. *United States*, 1 Ind. Terr. 638, 643; *Sparks* v. *Childers*, 2 Ind. Terr. 187, 198; *Hampton* v. *Mayes*, 3 Ind. Terr. 65, 72; *Rogers* v. *Nidiffer*, 5 Ind. Terr. 55, 58. In *Indian Land & Trust Co.* v. *Shoenfelt*, 135 Fed. Rep. 484, the Circuit Court of Appeals for the Eighth Circuit, in an action commenced by bill in equity in the United States Court in the Indian Territory, seems to have held that § 723, Rev. Stat., was applicable. But see a later decision by the same court in *St. Louis & S. F. R. Co.* v. *Cundieff*, 171 Fed. Rep. 319, 321.

Upon this question, we hold that if the demurrer may be deemed an assertion by the defendant of a right, under § 723, Rev. Stat., to have the case determined in equity, yet that section was so plainly inapplicable to the practice in the territorial court that no substantial Federal question is raised, such as would warrant a review here under § 709, Rev. Stat.

It is, however, next insisted that the demurrer amounted also to a demand for a trial by jury, and an assertion of a right thereto under the Federal Constitution (extended to the Territory by c. 182, § 31, 26 Stat. 96); and that this right was denied by the subsequent decision of the state court sustaining the judgment notwithstanding the demurrer.

We deem this untenable, for two reasons, viz., (a) because the demurrer was not a proper demand for trial by jury; and (b) the right to such a trial, if it existed, and

was properly demanded prior to Statehood, was subsequently waived.

(a) We have already pointed out that under the Code as contained in Mansfield's Digest the grounds of demurrer are limited, and the contention that defendant will be deprived of a jury trial is not one of them. Indeed, since a demurrer has the necessary effect of admitting the facts alleged in the complaint, a demand for a trial by jury is quite incongruous; for a jury has no function to perform where the facts are admitted. It is evident that, under the local practice, the court of the Territory was warranted in overruling this ground of demurrer, and that no question of Federal right is raised by its action in doing so.

(b) As already pointed out, the defendant afterwards answered in the state court, denying the facts set up in the complaint. But he did not in his answer, nor at any other time so far as the record discloses, demand a jury trial until after the court had found against him on the facts and rendered judgment accordingly. He did then move for a new trial upon the ground, among others, that there was error in trying the cause without submitting it to the jury, "when the parties thereto had not waived a jury trial."

While it is conceded that under Mansfield's Digest, § 5105, and also under § 5785 of the State Code (Comp. Laws Okla. 1909, p. 1256), a jury might be waived, it is insisted that since the case was tried after Statehood, and pursuant to the procedure prescribed by the state law, § 5808 (Okla. Comp. Laws 1909, p. 1258) applied, which prescribes the manner in which trial by jury may be waived, viz., "By the consent of the party appearing, when the other party fails to appear at the trial by himself or attorney. By written consent, in person or by attorney, filed with the clerk. By oral consent, in open court, entered on the journal."

The record shows no written consent, nor any entry upon the journal of oral consent. It does show that the action was in form an action in equity, normally triable without jury, and it further shows a trial of the issues before the court without a jury, in which trial the now plaintiff in error participated in person and by attorney, without taking any exception to the mode of trial.

The state courts did not pass upon the question whether under the local practice this amounted to a waiver of a demand for jury trial; both courts having entertained the view that the cause was properly brought in equity, in which case there was no right to trial by jury.

We deem it clear that in order to entitle himself to a review here under § 709, Rev. Stat., on the ground of a deprivation of the right to trial by jury, plaintiff in error should have "specially set up" his alleged right in proper time in the state court, and should not have relied upon a premature assertion of that right, contained in a demurrer where it had no proper place, and not reiterated at any time when there was an issue of fact to be tried.

Writ of error dismissed.